IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 25, 2008

STATE OF TENNESSEE v. CHARLES T. ROGERS

Appeal from the Criminal Court for Fentress County
No. 9263 Shayne Sexton, Judge

No. M2007-02756-CCA-R3-CD - Filed September 30, 2008

This is an appeal of the sentence imposed by the trial court. Defendant-Appellant, Charles T. Rogers ("Rogers"), pled guilty to: (1) possession of methamphetamine, a Class B felony; (2) possession of marijuana, a Class E felony; (3) possession of a Schedule II drug, a Class C felony; (4) possession of a Schedule III drug, a Class D felony; (5) the sale of methamphetamine, a Class B felony; (6) theft of property over $1000, a Class C felony; (7) felonious possession of explosives, a Class B felony; and (8) the promotion or manufacture of methamphetamine, a Class D felony. He agreed upon terms of imprisonment of nine, two, six, four, eight, four, eight, and four years, respectively. All sentences were to be served concurrently for an effective sentence of nine years as a Range I, standard offender. The manner of service, however, was to be determined by the trial court. The trial court accepted the terms of the plea agreement but after the sentencing hearing ordered Rogers to serve the sentence in confinement. The sole issue presented on appeal is whether the trial court erred in denying probation or any other form of alternative sentencing. For the reasons that follow, we affirm the judgment and sentence of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Leif Jeffers, Oneida, Tennessee (on appeal) and James S. Smith, Jr., Rockwood, Tennessee (at trial) for the appellant, Charles T. Rogers.

Robert E. Cooper, Jr., Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; William Paul Phillips, District Attorney General; and John W. Galloway, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL HISTORY

On September 17, 2007, Rogers appeared before the trial court and entered a plea of guilty to the above stated offenses. There is no transcript of the guilty plea colloquy in the record on appeal. We are therefore unable to determine whether Rogers contested the State's recitation of the facts. The State argues that this appeal should be dismissed because the record is incomplete. It is the appellant's burden to include all transcripts "necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b); see also State v. Ballard, 855 S.W.2d 557, 561 (Tenn. 1993) (holding failure to include transcript precludes appellate review); State v. Keen, 996 S.W.2d 842, 844 (Tenn. Crim. App. 1999) (holding trial court's ruling presumed correct in the absence of an adequate record on appeal) (citation omitted). However, the record[1] on appeal is sufficient to facilitate our review of this issue.

The judgments show Rogers entered into a plea agreement with the State in which he received an effective sentence of nine years as a Range I, standard offender. He was also to pay a ten thousand dollar fine. The plea agreement further provides, "The defendant is requesting alternative sentencing. [He] understands that the state will oppose that request."

On November 5, 2007, the trial court held a sentencing hearing in this matter. For the State, the proof consisted of the testimony of Officer Rob Lower of the Jamestown Police Department and Detective Ron Whited of the Fentress County Sheriff's Department, who were both involved in the investigation of Rogers.

Officer Lower testified that a confidential informant went into Rogers' home and purchased drugs from him on January 20, 2007. He monitored the drug transaction through a recording device which was placed on the confidential informant. As a result of the drug purchase, he obtained a search warrant for Rogers' home. The search revealed a large amount of methamphetamine and other drugs, a variety of pistols and rifles, and explosives. Significantly, there were other items recovered from the search which were listed in an 18-page, single-spaced exhibit. Officer Lower testified that Rogers admitted that he "traded" drugs for these items.

Officer Lower testified that Rogers was cooperative and gave a handwritten statement of admission. Rogers wrote:

> I have been selling meth for about 2 yrs. I have sold for cash or have traded for property. Not really one more than the other it evens out [sic]. My wife . . . knows I sell but has never been involved in any sale whatsoever. I do odd jobs and sheetrock finishing but the last few months selling meth has been my main income. I do use meth but it is not that big of a problem for me.
>
> The supply I have is what I purchase and resale. I would rather not say how much I give for it or where I get it. I will say that it is not coming from within

[1] The record contains the affidavit of complaint, indictment, judgments, pre-sentence report, trial court sentencing form, and the exhibits and transcript to the sentencing hearing.

> Fentress Co. What I had at the time of the search of my residence is the most I've ever had at one time. That is all I want to say. This is a true and factual statement[.]

Officer Lower also showed the trial court the distance between Rogers' home and a local high school which was less than 1000 feet. Detective Whited testified that Rogers was cooperative and advised him of the location of additional explosives which were not recovered in the initial search of his home.

For Rogers, the proof consisted of the testimony of Denton Richards, Derrick Richards, and Sheriff Chuck Cravens, lifelong family friends of Rogers, all of whom testified that he was non-violent and honest. Sheriff Cravens agreed that methamphetamine was a "big" problem in the county. He further stated the methamphetamine seized from Rogers' home was the largest seizure in Fentress County in the last twenty years. Additionally, Terry Rogers, Rogers' brother, testified that law enforcement officers took everything Rogers owned including items unrelated to drug sales. He further explained that Rogers could not work due to multiple back surgeries. He knew his brother was addicted to methamphetamine and described his brother's health as "very bad."

Following the sentencing hearing, the trial court ordered Rogers to serve a term of imprisonment of nine years as a Range I, standard offender, in the Tennessee Department of Correction.

Rogers then filed a timely notice of appeal to this Court.

STANDARD OF REVIEW

The standard of review for challenges to the manner in which the trial court imposed sentence is de novo upon the record with a presumption of correctness as to the trial court's determination. T.C.A. § 40-35-401(d) (2006). However, the presumption of correctness does not apply when the appealing party demonstrates that the trial court failed to affirmatively consider the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn.1991). Only upon such a showing will our review become purely de novo. Id.

In our de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on her own behalf, (7) any statistical information as to sentencing practices for similar offenses in the state, and (8) the potential for rehabilitation with treatment. T.C.A. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

ANALYSIS

I. Presumption of Correctness. As previously noted, Rogers did not include a transcript of the guilty plea colloquy on appeal. See State v. Keen, 996 S.W.2d 842, 844 (Tenn. Crim. App. 1999). The trial court's refusal to grant probation can be presumed correct on this ground alone. Id. Nevertheless, we will address the issue presented on appeal.

Rogers argues the trial court's sentence is not entitled to a presumption of correctness. In this case, the trial court incorporated into its confinement order a six page form entitled, "Sentencing Findings of Fact For Offenses Committed On Or After June 7, 2005." In varying sections, this form lists every potential range of sentence, every enhancement and mitigating statutory factor, findings for consecutive sentencing, and probationary considerations. Beside each section is a space for the trial court to mark which factor it applied. Rogers takes issue with discrepancies between this form and statements made by the trial court.

A. Enhancement Factor. Rogers argues the trial court's determination is not presumed correct because the trial court marked a section on the form showing that he had a history of criminal convictions or criminal behavior in addition to those necessary to establish the penalty range. See T.C.A. § 40-35-114(1) (2006). We fail to see, however, that the trial court erroneously considered this factor. Rogers ignores the second prong of this enhancement factor which allows the trial court to consider previous "criminal behavior." The trial court explained, "[i]t's very clear that this – this criminal enterprise was not just a one-time deal. [Rogers] was caught with many, many items suggestive of criminal behavior over and above that of selling drugs or possessing drugs." Furthermore, at the sentencing hearing, the court verbally acknowledged that Rogers had no significant history of prior convictions. The trial court emphasized that "[the law] punishes a defendant for having a criminal history. It does not give us credit for behaving ourselves our whole life, because that's expected. We're all supposed to abide by the law. And getting credit for never breaking the law is not what we do here."

Additionally, although the record clearly shows the trial court knew Rogers did not have a previous history of criminal convictions, Rogers entered an agreed upon sentence, and the length of the sentence was not affected by considering this factor.

B. Confinement Factors. Rogers further argues against the presumption because the trial court did not mark any of the factors listed in Tennessee Code Annotated section 40-35-103(1) (2006), all of which were listed on the sentencing form. See T.C.A. § 40-35-103(1)(A)-(C) (2006) (listing the factors upon which an order of confinement may be based). Although the court did not mark any of these factors on the sentencing form, it explicitly stated that the second factor supported confinement at sentencing. See T.C.A. § 40-35-103(1)(B) (2006). This court has held, "[W]hen there is a discrepancy between what is reflected in the sentencing hearing transcript and what is on the judgment form, the transcript controls." State v. Adrian Porterfield, No. W2006-00169-CCA-R3-CD, 2007 WL 3005349, at *13 (Tenn. Crim. App., Jackson, Oct. 15, 2007) (citations omitted). Additionally, there is no requirement for the trial court to use such a sentencing form at sentencing. See generally State v. Christopher Campbell, No. W2001-01916-CCA-R3-CD, 2002 WL 826076, at *2 (Tenn. Crim. App., Jackson, April 22, 2002) (stating "the circling of 'yes' or 'no' on a

sentencing form does not satisfy the mandatory [judgment] requirements of Rule 32 [of the Tennessee Rules of Criminal Procedure]"). So long as the trial court explicitly states on the record its consideration of Tennessee Code Annotated sections 40-35-103(A)-(C) (2006), its determination will be presumed correct.

At the sentencing hearing, the trial court stated:

> There – by agreement and by the presentation in Court, there is no significant history of criminal behavior by this particular defendant, so that does inure to his benefit.
>
> And so, along with that, . . . measures less restrictive than confinement have not been frequently or ever been applied for that matter, so that would not apply to him.
>
> Looking at the question of whether or not confinement is necessary to avoid depreciating the seriousness of the offense and confinement is particularly suited for providing an effective deterrent, it's very clear that this – this criminal enterprise was not just a one-time deal. This defendant was caught with many, many items suggestive of criminal behavior over and above that of selling drugs or possessing drugs. The sign ["Many Illegal Activities In Progress Enter At Your Own Risk"], I think, is very telling that there is – you know, very haughty in the 'We're not doing anything wrong here.' It's very clear that he was and – and proud of it.
>
> . . . .
>
> From the testimony here today, it's clear that he's battled Methamphetamine addiction. He also has said, either through argument or through other – someone else that he's not going to rehab or doesn't feel the need to go to rehab. He's fooling himself.

The trial court explicitly considered Tennessee Code Annotated sections 40-35-103(1)(A)-(C) (2006) and determined confinement was necessary "to avoid depreciating the seriousness of the offense" and that "[it] [was] particularly suited for providing an effective deterrent." See T.C.A. § 40-35-103(1)(B) (2006). It also considered Rogers' lack of potential for rehabilitation. T.C.A. § 40-35-103(5) (2006). Accordingly, our review is de novo with a presumption of correctness.

II. Imposition of Sentence. Rogers argues that the trial court erred in denying him probation or alternative sentencing. He nevertheless argues for probation or an alternative sentence under Tennessee Code Annotated section 40-35-303(a) (2006).

A defendant is eligible for probation if the actual sentence imposed upon the defendant is ten years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. See T.C.A. § 40-35-303(a) (2006). The trial court shall automatically consider probation as a sentencing alternative for eligible defendants; however, the defendant bears the burden of proving his or her suitability for probation. T.C.A. § 40-35-303(b) (2006). No criminal defendant is automatically entitled to probation as a matter of law. Id., Sentencing Commission Comments; see

State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would serve the ends of justice and the best interests of both the public and the defendant. See State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002) (citation omitted).

The trial court should consider the nature and circumstances of the offense, the defendant's criminal record, the defendant's background and social history, his present condition, including physical and mental condition, and the deterrent effect on the defendant when considering probation. See State v. Kendrick, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the appropriate sentence. See T.C.A. § 40-35-103(5) (2006). Moreover, our supreme court has held that "truthfulness is certainly a factor which the court may consider in deciding whether to grant or deny probation." State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983).

As we have previously discussed, in deciding whether to order confinement, the trial court should consider whether (1) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; (2) confinement is necessary to avoid depreciating the seriousness of the offense, or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses; or (3) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. T.C.A. § 40-35-103(1)(A)-(C) (2006). The trial court should also consider the mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and -114 (2006). T.C.A. § 40-35-210(b)(5) (2006); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Finally, the sentence imposed should be the least severe measure necessary to achieve its purpose. T.C.A. § 40-35-103(4) (2006).

In ordering Rogers to serve his sentence in confinement, the record shows the trial court considered Tennessee Code Annotated sections 40-35-103(1)(A)-(C) (2006). It applied section (B) and reasoned Rogers "was caught with many, many items suggestive of criminal behavior over and above that of selling drugs or possessing drugs." Despite the favorable testimony of Rogers' witnesses, there was overwhelming proof that he was engaged in a large scale "criminal enterprise." Rogers admitted to dealing drugs for the previous two years which was supported by the lack of any verifiable employment history. The search of his home resulted in the recovery of a massive amount of guns, drugs, stolen property, and explosives. Rogers was responsible for the biggest methamphetamine recovery in Fentress County in twenty years. The proof at sentencing fully supported the trial court's conclusion that Rogers was a "tremendous risk in [the] community" and justified confinement.

Based on the aforementioned facts, law, and analysis, the trial court properly denied alternative sentencing. Rogers has not met his burden on appeal of showing that his sentence of confinement was improper.

Accordingly, the judgment of the trial court is affirmed.

CONCLUSION

We conclude that the trial court properly denied alternative sentencing in this case, thereby requiring the appellant to serve an effective nine-year sentence, pursuant the terms of his guilty plea agreement. Accordingly, the judgment of the trial court is affirmed.

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CAMILLE R. MCMULLEN, JUDGE